Chapter XIII

PUBLIC DISCLOSURE

A. General Description of Functions

In addition to removing incompetent, negligent, dishonest, and impaired physicians from the marketplace through its enforcement program, another way in which MBC implements its "paramount" public protection priority[299] is by disclosing licensee information to the public, to enable consumers to make informed choices when selecting a health care practitioner.

The Board's public disclosure policy is an important complement to its enforcement program. The preceding chapters have described many limitations on the Board's ability to protect the public through its enforcement program — including limitations that are within its control (for example, lengthy delays due in part to its failure to demand compliance with medical records procurement laws[300]) and others that are beyond its control (for example, its limited resources,[301] the recent staffing losses at both MBC and HQE,[302] and the failure of many of its most important sources of information to report physician misconduct as required by law[303]). As a result of these flaws, it is unreasonable to expect that MBC will be able to promptly remove all dangerous physicians from the marketplace. Even assuming these flaws are addressed and resolved, consumers are entitled to information about the people to whom they are entrusting their lives and health. It is thus reasonable to expect MBC, as a complement to its enforcement program, to provide consumers with true, accurate, and complete information about its licensees so they can make informed choices and protect themselves from physicians with whom they would prefer not to deal.

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[299] Bus. & Prof. Code §§ 2001.1, 2229(a) and (c).

[300] *See supra* Ch. VI.B.2, Ch. VII.B.3, Ch. IX.B.4.

[301] *See supra* Ch. V.B.2.

[302] *Id*.

[303] *See supra* Ch. VI.B.5.

Further, and as astutely noted by the Joint Legislative Sunset Review Committee in 2002, "poor public disclosure is worse than no public disclosure." In its final report and recommendations on MBC's 2001–02 sunset review, the JLSRC stated: "A public program of disclosure that purports to provide information a patient might find relevant about the history and record of a physician, but which for whatever reason falls short, is worse than no disclosure program at all. An inadequate program leads a diligent patient into erroneously believing that their physician was trouble-free, when the physician may in fact have an extensive record of problems. An inadequate program of public disclosure leads a patient into an incorrect belief that no further investigation of their physician is warranted."[304]

The Board's evolving public disclosure policy. As described in Chapter IV, MBC disclosed nothing about its licensees except its own disciplinary actions prior to 1993. In response to criticism of its public disclosure policy in the 1989 *Code Blue* report[305] and the 1992 "Sixty Minutes" exposé,[306] and as a result of discussions at the March 1993 Medical Summit that followed release of the CHP report,[307] MBC liberalized its public disclosure policy in May 1993, and that policy was codified (for the most part) in SB 916 (Presley) in 1993. Under SB 916 and regulations implementing that bill, the Board disclosed (in addition to its own disciplinary actions) felony convictions, medical malpractice judgments in excess of $30,000, temporary restraining orders and interim suspension orders, Board-ordered limitations on practice, public letters of reprimand, citations, fines, and disciplinary actions taken by medical boards in other states. From 1993 through 1997, the Board disclosed this information in writing upon the request of a consumer.

By 1997, the Internet had become a widely-used means of communication. Effective January 1, 1998, AB 103 (Figueroa) added section 2027 to the Business and Professions Code. Section 2027 required the Board to create a Web site and to post the "public information" described above on the Web site so consumers could quickly and easily access information about their physicians' histories. AB 103 also required the Internet posting of new information not previously disclosed by MBC: It required the disclosure of *all* medical malpractice judgments and arbitration awards (thus removing the $30,000 threshold), and — for the first time — permitted MBC to disclose (from section 805 reports) adverse peer review actions resulting in the termination or revocation of a physician's privileges by a hospital or HMO.[308]

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[304] Joint Legislative Sunset Review Committee, *Final Recommendations of the Joint Legislative Sunset Review Committee on the Medical Board of California* (May 2002) at 4.

[305] *See supra* Ch. IV.B.

[306] *See supra* Ch. IV.D.

[307] *Id*.

[308] *See supra* Ch. IV.E.

By 2002, dissatisfaction with MBC's public disclosure policy was reflected in numerous news articles revealing the many ways in which physicians and their counsel exploited loopholes in MBC's reporting statutes and otherwise manipulated the legal system in order to avoid reporting to the Board and — therefore — to avoid disclosure by the Board of otherwise disclosable events.[309] In addition, injured patients and consumer advocates questioned why the public is deprived of information on medical malpractice settlements and other adverse events relevant to medical practice when every other societal institution which deals with physicians — including state medical boards, medical malpractice insurers, hospitals, and HMOs — is able to acquire and use their entire professional history before choosing to deal with them.[310] These issues were predominant at MBC's 2001–02 sunset review proceeding and the resulting legislation — SB 1950 (Figueroa) — addressed some of them. Specifically, SB 1950 closed loopholes in MBC's reporting statutes by clarifying that a medical malpractice judgment in any amount must be reported to MBC "whether or not vacated by a settlement after entry of the judgment, that was not reversed on appeal . . . ."[311] It also requires the reporting of settlements over $30,000 "if the settlement is based on the licensee's negligence, error, or omission in practice, or by the licensee's rendering of unauthorized professional services, and a party to the settlement is a corporation, medical group, partnership, or other corporate entity in which the licensee has an ownership interest or that employs or contracts with the licensee."[312] Finally, SB 1950 permitted MBC — for the first time — to disclose some civil malpractice settlements.[313]

Statutory framework. MBC's public disclosure policy is codified in a complex and tangled web of statutes and regulations — primarily sections 803.1 and 2027 of the Business and Professions Code. Superimposed over those MBC-specific statutes[314] are the California Public Records Act[315]

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[309] *See, e.g.*, Todd Wallack, *Patients Don't Get Full Story on Doctors*, S.F. CHRON., Jan. 6, 2002, at A1 (malpractice judgments settled on appeal considered nondisclosable "settlements" by MBC rather than judgments; MBC's policy to disclose judgments but not settlements has resulted in high settlement rate to avoid disclosure); Cheryl Clark, *Loophole Leaves Some Medical Suits Off Web Site*, S.D. UNION-TRIB., Apr. 29, 2002 (malpractice judgments settled on appeal considered nondisclosable "settlements" by MBC rather than judgments; Board's failure to disclose misdemeanor criminal convictions deprives consumers of public information about criminal history of physicians); William Heisel and Mayrav Saar, *Doctors Without Discipline*, O.C. REGISTER, Apr. 7, 2002 ($53.5 million judgment entered against physician's medical group instead of physician not disclosed by MBC).

[310] *See, e.g.*, William Heisel and Hanh Kim Quach, *Family Pleads for Reform*, O.C. REGISTER, May 2, 2002.

[311] Bus. & Prof. Code § 801(b).

[312] *Id.*; *see also id.* at §§ 801.1(b), 802(b).

[313] *Id.* at § 803.1(b)(2). *See supra* Ch. IV.G.

[314] Sections 803.1 is also applicable to the Board of Podiatric Medicine and the Osteopathic Medical Board of California.

[315] Gov't Code § 6250 *et seq*.

(which specifies that most agency records are public information unless they fall within narrow enumerated exemptions), the Information Practices Act[316] (which limits public disclosure of "personal information" held by government agencies), and Article I, section 1 of the California Constitution (which was enacted to preclude unnecessary "government snooping" and the overbroad collection, retention, and misuse of personal information by government and business interests).

As a result of the interaction of all of these provisions, there are essentially four categories of "information" on physicians and three ways to obtain some (but not all) of it — and one will receive different information depending on how and who one asks:

■ **"Public information" available on the Internet**. The Medical Board maintains a Web site at www.medbd.ca.gov or www.caldocinfo.com. At the right side of the home page is a link entitled "Check Your Doctor Online." Clicking on that link brings up an information page listing the information that is — and is not — available from MBC about its licensees. Entering the name or license number of a California physician will bring up that physician's "screen," which reveals her license status, address of record, original issue date of the license, its expiration date, and any "public record actions" — meaning enforcement-related actions that may be posted on the Web site. Section 2027 details the categories of information that the Legislature has determined is "public information" that MBC must post on its Web site — and is thus available to the public with a click of a mouse:

(1) with regard to the status of the license, whether or not the licensee is in good standing, subject to a TRO or ISO, or subject to any of the enforcement actions set forth in section 803.1;[317]

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[316] Civil Code § 1798 *et seq*.

[317] The "enforcement actions" set forth in section 803.1 include "enforcement actions taken against a licensee by [MBC] or by another state or jurisdiction, including all of the following": TROs/ISOs; revocations, suspensions, probations, or limitations on practice ordered by the board, including those made part of a probationary order or stipulated agreement; public letters of reprimand; and infractions, citations, or fines.

One defense attorney we interviewed alleged that MBC posts notices of disciplinary action on its Web site before they have become effective. According to the attorney, "this premature posting publishes to the world that this is a bad doctor even though he or she may be seeking a petition for reconsideration from the Medical Board or judicial review in superior court." MBC posts a disciplinary action on the Internet on the date it is ordered and mailed to the respondent; if the decision has a delayed effective date (for example, 30 days hence), that effective date is also posted. If the physician files a timely petition for reconsideration that MBC grants, the Internet posting is changed to read "decision stayed" or "stay order granted" pending the conclusion of DMQ's reconsideration. If a petition for writ challenging a DMQ decision is filed and a stay is granted, MBC usually notes on the Internet that a stay has been granted and an appeal is pending. This is accurate information. The Medical Board has taken disciplinary action after affording the physician a panoply of due process rights, it has temporarily stayed that decision in order to reconsider it, and/or a court has temporarily stayed that decision to afford it time to meaningfully review the matter, and an appeal is pending. Because of MBC's paramount public protection priority, the Monitor is not prepared to recommend a change in that policy. Public Citizen's Health Research Group, which evaluates and rates the Web sites of state medical boards for content and user-friendliness, agrees: "If a court overrules or vacates a board action and exonerates the physician and the court decision is final, information on that action should be removed from the database. While an appeal is pending, or while a remanded action is being considered, information on the action and the court's decision should continue to

(2) prior discipline by the board of another state or jurisdiction;

(3) felony convictions reported to the Board after January 3, 1991;

(4) current accusations filed by the Attorney General, including those accusations that are on appeal;[318]

(5) any malpractice judgment or arbitration award reported to the board after January 1, 1993;

(6) any hospital disciplinary actions that resulted in the termination or revocation of a licensee's hospital staff privileges for a medical disciplinary cause or reason;

(7) a description of categories of information that are not disclosed; and

(8) any information required to be disclosed pursuant to section 803.1.[319]

Section 2027(b) limits the amount of time that certain information may be posted on MBC's Web site. While felony convictions and section 805 reports of hospital disciplinary action resulting in termination or revocation of privileges may be disclosed on the Internet indefinitely, the remaining categories of information described in section 2027 may be posted only for a ten-year period "and after the end of that period shall be removed from being posted on the board's Internet Web site."[320]

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be reported in the database." Public Citizen Health Research Group, *Survey of Doctor Disciplinary Information on State Web Sites* (Apr. 9, 2002) at 4.

[318] The term "current accusation" means an accusation that has not been dismissed, withdrawn, or settled, and has not been finally decided upon by an administrative law judge and the Medical Board of California unless an appeal of that decision is pending. Bus. & Prof. Code § 2027(a)(4).

[319] The information "required to be disclosed by section 803.1" includes: (a) the "enforcement actions" described in footnote 317 above; (b) civil judgments in any amount, "whether or not vacated by a settlement after entry of the judgment, that were not reversed on appeal and arbitration awards in any amount of a claim or action for damages for death or personal injury caused by the physician and surgeon's negligence, error, or omission in practice, or by his or her rendering of unauthorized professional services"; (c) some civil malpractice settlements, as described in Chapter XIII.B. below, and whose disclosure must be accompanied by a lengthy statement prescribed in section 803.1(c); (d) current specialty certification by a national board recognized by MBC; (e) approved postgraduate training completed; (f) the "status of the license of a licensee"; and (g) summaries of hospital disciplinary actions that have resulted in the termination or revocation of a physician's staff privileges for medical disciplinary cause or reason.

[320] Bus. & Prof. Code § 2027(b)(2). As interpreted and implemented by the Medical Board, the ten-year period specified in section 2027(b) started on January 1, 2003 — the effective date of SB 1950 (Figueroa). Thus, all information on the Board's Web site as of that date will remain on its Web site until January 1, 2013 — at which time information that is (a) over ten years old, and (b) not exempted from the ten-year requirement will be removed from the Board's Web site.

■ **"Public information" that is disclosed but is not posted on MBC's Web site**. Accessible via a Public Records Act request or a letter or telephone call to MBC, this category includes public information of an enforcement nature that is maintained by MBC but is not permitted to be posted on the Board's Web site under section 2027. Examples of this kind of information include the following:

(1) items of information that would be permitted to be disclosed on the Web site but — as of January 1, 2013 — are over ten years old and are thus prohibited from Web posting under section 2027(b);

(2) MBC disciplinary actions that were taken before 1990 (the year MBC began to use the CAS computer system) — actions taken before that date and recorded on the Board's prior computer system could not be "imported" onto its Web site created in 1998;[321] and

(3) filed accusations that have been withdrawn, dismissed, settled, and/or are no longer "current" pursuant to the definition of that word in section 2027(a)(4) and thus may not be posted on the Web site. This category includes about 300 so-called "enforcement agreements" negotiated by the Board in the mid-1990s, in which MBC filed an accusation but subsequently agreed to withdraw it on the condition that the physician take and pass an oral competency exam or successfully complete a Board-directed educational program. If and when the physician completed the requirement, MBC would "withdraw" the accusation and drop the matter entirely. Because filed accusations and their subsequent disposition have historically been considered public information,[322] MBC is required to disclose this information if requested in a Public Records Act request.

If MBC has disciplinary information about a physician which is not permitted to be posted on the Web under section 2027, it states — next to the "Public Record Actions" line — "none available on Web site" and invites the inquirer to click on a link that states: "California law does not permit all of a physician's records to be posted on the Board's Web site. Additional information that you may or may not find relevant about your doctor is available if you contact us directly at: Central File Room, (916) 263-2525. The Board encourages you to discuss with your physician any information the Board provides to you."

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[321] For example, the Monitor knows of a physician whose license was revoked by MBC at least four times prior to 1990; on most of those occasions, the revocation was stayed and the physician's license was put on five years' probation on numerous terms and conditions. He completed his last probation in 1994. MBC filed another accusation against him in April 2004, and his hearing is pending. His MBC Web site screen reveals only the 2004 accusation and the completion of probation in 1994. None of the pre-1990 disciplinary actions are revealed on MBC's Web site, but they are all public information which MBC is required to reveal in response to a request under the Public Records Act.

[322] See 16 CAL. CODE REGS. § 1354.5(b) (MBC's public disclosure regulation requiring disclosure of "any public document filed against any physician and surgeon, and any disposition thereof").

■ **"Public information" that is known to MBC but not disclosed at all**. This category includes information that is technically "public information," is known to the Medical Board, but is not disclosed by MBC because it is not disclosable under either section 803.1 or section 2027. Examples of this kind of information include the following:

(1) criminal arrests of physicians. MBC receives information on arrests of physicians because all physicians are fingerprinted at point of licensure. Those fingerprints are entered into the Department of Justice's Criminal Identification and Information (CII) system. If a physician is subsequently arrested, the CII system's "subsequent arrest notification" mechanism notifies MBC of the arrest. Although arrest information is considered public information under the Public Records Act,[323] MBC does not disclose criminal arrests of physicians to the public in any way. Arrest information is available through local law enforcement agencies and is often published in local newspapers.

(2) misdemeanor criminal convictions of physicians. All criminal convictions are public information. Theoretically, MBC receives criminal conviction information — including misdemeanor criminal conviction information — because court clerks are required to report convictions to MBC.[324] However, MBC does not disclose any misdemeanor criminal convictions. This information is public information and is available at county courthouses.

(3) civil malpractice settlements that do not qualify for disclosure under section 803.1(b)(2) — these are discussed below in Chapter XIII.B. If these settlements are over $30,000, MBC must be notified of them by malpractice insurance companies or the physician licensee. Information on civil malpractice settlements that have not been sealed is public information and is available at county courthouses. MBC's Web site contains a link to superior court information, but online availability of civil malpractice settlement information varies widely by county.

■ **"Non-public information" known to MBC that is not disclosed**. This category includes enforcement-related information that is known to MBC but is not disclosed because no statute expressly permits it to be disclosed. Thus, a Public Records Act request would not yield this information, and it is not publicly available anywhere else. Examples of this kind of information include the following:

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[323] Gov't Code § 6254(f)(1).

[324] Business and Professions Code section 2236(c) requires the clerk of the court "in which a licensee is convicted of a crime" to "within 48 hours after the conviction, transmit a certified copy of the conviction to the board." As noted in Chapter VI, court clerks do not always comply with this requirement, because they do not know about the reporting requirement and many do not know that a defendant in their courtroom is a physician whose criminal conviction must be reported to the Medical Board. *See infra* Ch. VI.B.5 and Recommendation #15.

(1) complaints;[325]

(2) investigations — including completed investigations that have been referred to HQE for the filing of an accusation;[326] and

(3) hospital disciplinary actions that have not resulted in termination or revocation of a physician's privileges, including suspensions, restrictions, resignations while under investigation and/or with charges pending, and extended leaves of absence to enter drug/alcohol rehabilitation programs. The vast majority of peer review actions fall into this category and are not disclosed. Of 157 peer review actions reported to MBC in 2003–04, only six (6) were disclosable; the rest — including resignations with charges pending and drug/alcohol-related leaves of absences — may not be disclosed by MBC.

B. Initial Concerns of the MBC Enforcement Monitor

1. The fragmented tangle of overlapping statutes — including drafting errors and inconsistencies — frustrates the purpose of MBC's Web site, unnecessarily exposes MBC to litigation, and results in the disclosure of different information depending on the mode of inquiry.

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[325] Courts have held that complaints — even complaints that are not referred for investigation — fall within the "investigatory files" exemption to the Public Records Act in Government Code section 6254(f). *See*, *e.g.*, *Black Panther Party v. Kehoe* (1974) 42 Cal. App. 3d 645.

However, some Department of Consumer Affairs agencies disclose complaints prior to the filing of an accusation. The Board of Podiatric Medicine, whose policy is "to permit the maximum public access to information in its possession consistent with the requirements of the California Public Records Act . . . , the Information Practices Act . . . , section 803.1 of the Business and Professions Code, and the individual's right of privacy guaranteed by the California Constitution," (16 CAL. CODE REGS. § 1399.700), discloses "the nature of all complaints on file which have been investigated by the Board and referred for legal action to the Attorney General . . ."; this information is accompanied by a disclaimer set forth in Board regulation. 16 CAL. CODE REGS. § 1399.704(a).

Going even further, the Contractors State License Board (CSLB) is required by statute to "make available to members of the public the date, nature, and status of all complaints on file against a licensee that do either of the following: (1) Have been referred for accusation. (2) Have been referred for investigation after a determination by board enforcement staff that a probable violation has occurred, and have been reviewed by a supervisor, and regard allegations that if proven would present a risk of harm to the public and would be appropriate for suspension or revocation of the contractor's license or criminal prosecution." Bus. & Prof. Code § 7124.6(a). In other words, CSLB discloses not only complaints referred to the Attorney General's Office for legal action, but also complaints in which sufficient investigation has been performed to indicate a "probable violation" that, if proven, would justify suspension or revocation of the license or criminal prosecution.

[326] Generally, pending investigations fall within the "investigatory files" exemption to the Public Records Act in Government Code section 6254(f).

One important purpose of MBC's Web site was to provide the public with easy access to all public information about California physicians.[327] By implication, another purpose might have been to relieve MBC of the costly and time-consuming pre-AB 103 duty of responding to thousands of written or telephonic requests for physician-specific information.[328] The idea was to load the Medical Board's repository of public information about its licensees onto the Internet to provide consumers with quick and easy access to that information so they can make better-informed health care choices.

Over the years, that intent has been frustrated by the language of the laws themselves. Under the laws as they exist today, consumers who check MBC's Web site will be given only information specifically authorized by section 2027. Consumers who call the Board's Central File Room or submit a Public Records Act request will be given a different set of information. And consumers who consult their county courthouses — or perhaps many of them in large communities such as Los Angeles and the Bay Area — may receive even more information. Although most of this information is technically "public information," is known to the Medical Board, and could easily be loaded onto the Web site, the complexities of the statutes and the unwillingness of MBC to expose itself to more expensive litigation[329] over its public disclosure policy means that disclosure varies based on how (and who) the consumer asks for information.

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[327] According to many legislative analyses of AB 103 (Figueroa), "allowing the public easy access to important information about physicians, particularly in the area of medical negligence, and putting that information into proper context is an essential element of genuine health care reform. The author states a shroud of secrecy exists around medical malpractice information and doctor disciplinary reports from hospitals. The author states this issue has received national attention due to the enactment of a Massachusetts law which provides for the release of detailed information about physician disciplinary actions and malpractice suits; according to the author, this bill mirrors the key provisions of the Massachusetts law. The author concludes this bill will help consumers make better-informed choices about their health care."

[328] Public Citizen's Health Research Group, which evaluates and rates the Web sites of state medical boards for content and user-friendliness, recognizes this concept: "Unless a board Web site provides adequate information about actions, patients will be unable to use the site to make an informed choice in selecting a physician. For these patients, contacting the board by phone or mail will still be necessary. This represents a lost opportunity for the board to enhance consumer access to doctor disciplinary data and reduce its own workload." Public Citizen Health Research Group, *Survey of Doctor Disciplinary Information on State Web Sites* (Apr. 9, 2002) at 4.

[329] MBC has had to defend its public disclosure policy in a number of lawsuits, including the California Medical Association's November 1993 challenge to MBC's May 1993 decision to disclose felony convictions, malpractice judgments over $30,000, other-state discipline decisions, and completed investigations at point of referral to HQE. Additionally, in 2002, the insurance industry sued MBC to stop it from disclosing section 801 reports of civil settlements to the *San Francisco Chronicle* in response to a Public Records Act request. After a flurry of briefing by MBC, the insurance industry, the *Chronicle* (which intervened in the action), and the California Medical Association, the court preliminarily enjoined MBC from disclosing the settlement information on March 8, 2002. *California Association of Professional Liability Insurers, et al. v. Joseph*, No. 02-CS-00231 (Sacramento County Superior Court). Subsequent to the filing of the lawsuit, SB 1950 (Figueroa) was enacted and, effective January 1, 2003, substantially changed the statutes pertaining to the disclosure of medical malpractice settlement information by MBC. In July 2004, the plaintiffs voluntarily dismissed the action.

As described above, section 803.1 and the Public Records Act set forth the "public information" that MBC must disclose. Section 2027 sets forth the "public information" that MBC must disclose *on the Internet*. Inconsistencies between sections 803.1 and 2027 have resulted in concealment of some information from the public, confusion, and litigation. For example:

■ On its face, section 2027 — as added by AB 103 Figueroa in 1998 — does not permit MBC to disclose its own prior disciplinary actions on the Internet. This makes little policy sense and is surely a drafting error;[330] MBC has always disclosed its own disciplinary actions, and one goal of AB 103 was to require MBC to post on the Internet the information it was already disclosing. However, to this day, section 2027 limits MBC's disclosure of prior discipline to "discipline by the board **of** another state or jurisdiction, as described in Section 803.1" (emphasis added). Contrary to section 2027, section 803.1 states that "the Medical Board of California . . . shall disclose to an inquiring member of the public information regarding any enforcement actions taken against a licensee by [the] board **or** by another state or jurisdiction . . . (emphasis added). Although section 2027 was amended in 2002 to require the Internet disclosure of "any information required to be disclosed pursuant to Section 803.1," MBC is being sued right now by a physician who contends that — because of the use of the word "of" in section 2027 — MBC is not permitted to disclose its own prior disciplinary action against him on the Internet.[331]

■ As noted above, section 2027 was amended in 2002 to require MBC to post on the Internet not only the information specified in section 2027 but also the information specified in section 803.1.[332] Section 2027 was also amended to place time limits on MBC's Internet disclosure of many of the information categories in section 2027.[333] However, no time limit was specified for the cut-off of disclosure of "any information required to be disclosed pursuant to Section 803.1."

■ Finally, the 2002 amendment to section 2027(a)(4), which restricts MBC's authority to disclose accusations that have been "dismissed, withdrawn, *or settled*" on the Internet, appears to conflict with section 803.1's mandate that MBC disclose (on the Internet, pursuant to section

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[330] As introduced on January 9, 1997, AB 103 would have required MBC to post on the Internet "with regard to prior discipline, whether or not the licensee has ever been subject to discipline by the board **or** another state or jurisdiction" (emphasis added). Without explanation, the "or" was changed to "of" on April 9, 1997. However, every single legislative analysis of AB 103 on and after April 9, 1997 continued to state that AB 103 requires MBC to post all prior discipline — whether imposed by MBC or an out-of-state medical board. Thus, it appears the change from "or" to "of" was not intended, and was a drafting error.

[331] *Szold v. Medical Board of California*, 4 Civil No. D04448 (petition for writ of mandate denied by San Diego County Superior Court; appeal pending in Fourth District Court of Appeal).

[332] Bus. & Prof. Code § 2027(a)(8).

[333] *Id*. at § 2027(b).

2027(a)(8)) "[r]evocations, suspensions, probations, or limitations on practice ordered by the board, including those made part of a probationary order *or stipulated agreement*."[334]

Some of these problems may stem from hurried legislative drafting; others may stem from the Board's overly cautious interpretation of the language and its unwillingness to risk litigation it can ill afford at this juncture. The Monitor is acutely aware that knowledgeable and reasonable people have spent many hours debating the impact of the language in these overlapping statutes; perhaps the better approach — and certainly one more consistent with the Board's public protection mandate — would be to draft "clean-up" amendments that combine and harmonize sections 803.1 and 2027, eliminate obvious drafting errors and inconsistencies, and ensure that all "public information" known to the Medical Board is posted on its Web site.

2. SB 1950's civil settlement disclosure provision has had minimal effect.

As noted above, MBC's 2001–02 sunset review took account of a series of media articles illuminating flaws in the Board's enforcement program and its loopholed public disclosure policy.[335] In its May 1, 2002 background paper for MBC's sunset hearing, JLSRC staff called for "a publicly credible disclosure program that — by definition — does not conceal from patient-consumers information they might consider important, that is available to multiple other stakeholders, and that will also permit market forces to favor quality medical care providers."[336]

In its final report and recommendations, the JLSRC itself stated that "the Board's current disclosure policy, including the information available on its web site, does not accurately reflect whether an individual physician has a past history that could very well influence the decision a person may make regarding which physician they choose for their health care. For example, the Board's current web site does not disclose to the public categories of information available, and considered important, by the Board, medical malpractice insurers, HMOs and hospitals for investigation and disciplinary purposes, underwriting purposes, and liability exposure purposes, respectively." In particular, the JLSRC noted that at least ten other states (at that time) disclosed medical malpractice settlements and called for a similar statute requiring their disclosure in California.[337]

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[334] *Id*. at § 803.1(a)(3).

[335] *See supra* note 309; *see also* Ch. IV.G.

[336] Joint Legislative Sunset Review Committee, *Medical Board of California: Background Paper for May 1, 2002 Hearing* (May 1, 2002) at 2.

[337] Joint Legislative Sunset Review Committee, *Final Recommendations of the Joint Legislative Sunset Review Committee on the Medical Board of California* (May 2002) at 2. JLSRC staff's May 1, 2002 background paper included a National Conference of State Legislatures study revealing that ten other states (Arizona, Connecticut, Florida, Georgia,

Prior to its sunset review hearing, MBC's Public Information Disclosure Committee had commenced a series of hearings on the Board's public disclosure policy in January 2002. After much public testimony and debate, the Public Information Disclosure Committee, Division of Medical Quality, and the full Board all approved a proposal to disclose all medical malpractice settlements over $30,000 at their May 2002 meetings. Although they had initially considered proposals to disclose only multiple and/or very large malpractice settlements, the Board and its committees discarded those ideas in favor of disclosing all settlements with a strong disclaimer — with the idea of letting the consumer be the judge. Early versions of SB 1950 incorporated MBC's proposal, with the following rationale: "As detailed in recent news articles, physicians with repeated histories of even multi-million dollar malpractice settlements could misleadingly get a 'clean bill of health' from the Board's Web site. This is because medical malpractice settlement information is not disclosed to the public — even though every other stakeholder insists upon the same information. The Board obtains it for enforcement purposes. Hospitals, medical groups, and medical malpractice insurers all insist upon it to weigh the potential risk of associating with particular physicians . . . ."[338]

The California Medical Association and the insurance industry persuaded several key legislators to oppose civil settlements, arguing that (1) the number of malpractice claims against physicians is determined by many factors, including the inherent risks of some specialties and the number of high-risk patients in a physician's practice; (2) cases are often settled not because they are meritorious but because they will cost more to try than to settle, and settlement decisions are influenced by many factors, including the availability of witnesses, the complexity of the medical issue, the relative sympathy for the plaintiff, and the emotional consequences to the physician in going to trial; (3) settlement disclosure is likely to drive up malpractice premiums because physicians will more frequently refuse to settle, thus increasing malpractice insurance costs and delaying resolution for all concerned; and (4) the assurance of confidentiality is an overriding factor facilitating settlement of a case, which is especially true when the physician believes the case against him or her is without merit. Without the assurance of confidentiality, physicians — who have the right to refuse to settle[339] — will go to trial much more often, thereby driving up the cost of malpractice insurance.

Idaho, Rhode Island, Tennessee, New York, Virginia, and Massachusetts) all disclose medical malpractice settlement information. JLSRC staff conducted interviews with officials from the states' medical boards, and those interviews had a common theme. "While many physicians opposed the disclosure of such information initially, once implemented it appears as though none of these states received a noteworthy number of complaints about the disclosure from physicians. It should be underscored that each of these states reveals medical malpractice settlement information accompanied by certain disclosures and explanatory disclaimers to place the information in an appropriate and useful context . . . . Current California law already permits the Board to craft appropriate disclaimers or explanatory statements included with any information released." Joint Legislative Sunset Review Committee, *Medical Board of California: Background Paper for May 1, 2002 Hearing* (May 1, 2002) at 11.

[338] Senate Business and Professions Committee, *Analysis of SB 1950 (Figueroa)* (May 7, 2002).

[339] *See* Bus. & Prof. Code § 801(f).

As the summer of 2002 wore on, numerous amendments diluted the settlement disclosure provision. In the end, SB 1950's settlement disclosure provision authorizes MBC to disclose civil malpractice settlements according to the following procedure:

(1) First, the Board must adopt regulations classifying each physician specialty as "high risk" or "low risk." In adopting those regulations, the Board must consult with and convene public meetings of commercial underwriters of medical malpractice insurance companies, health care systems that self-insure physicians, and representatives of California medical specialty societies; further, it "shall utilize" the carriers' data to establish the two risk categories.[340]

(2) MBC may disclose the civil settlements of a physician in a "low risk" specialty only if the physician has three or more settlements in the past ten years. MBC may disclose the civil settlements of a physician in a "high risk" specialty only if the physician has four or more settlements in the past ten years.[341] The Board may disclose only settlements occurring and reported to the Board after SB 1950's effective date — January 1, 2003.

(3) When it discloses civil settlements, the Board is not permitted to disclose the actual dollar amount of a settlement. Instead, the Board must "put the number and amount of the settlement in context by doing the following": (a) compare the settlement amount to the experience of other licensees within the same specialty or subspecialty, and indicate if it is below average, average, or above average for the most recent ten-year period; (b) report the number of years the licensee has been in practice; and (c) report the total number of licensees in that specialty or subspecialty, the number of those who have entered into a settlement agreement, and the percentage that number represents of the total number of licensees in the specialty or subspecialty.[342]

(4) When it discloses civil settlements, the Board is required to attach a lengthy disclaimer mandated in section 803.1(c).

Commencing in July 2003, MBC began its effort to implement the procedures described above. As required by the statute, it consulted with insurers, self-insurers, and specialty societies to obtain input on which specialties should be classified as "high risk" vs. "low risk." According to Board staff, the insurers provided data that was not usable; thus, staff performed its own analysis of other insurance carrier data available to it — settlements reported to the Board under section 801 for the prior ten-year period of 1993–2003. Based on this analysis, staff recommended the

[340] *Id*. at § 803.1(e).

[341] *Id*. at § 803.1(b)(2)(A).

[342] *Id*. at § 803.1(b)(2)(B).

identification of neurological surgery, orthopedic surgery, obstetrics, and plastic surgery as the "high risk" specialties requiring four or more settlements in a ten-year period before any of them will be disclosed; all other specialties are considered "low risk." DMQ adopted this proposal in section 1355.31, Title 16 of the California Code of Regulations, at its November 7, 2003 meeting; that regulation was approved by the Office of Administrative Law on October 4, 2004.

In its analysis of settlements reported in 1993–2003, MBC staff found that only 375 physicians settled three or more malpractice claims during that ten-year period, and only 121 physicians settled more than four. As a result, staff predicted that disclosure of settlements under SB 1950 would occur very rarely. Staff was correct. In almost two years since SB 1950 became effective, the Medical Board has disclosed civil malpractice settlements on a grand total of seven (7) physicians — all of whom have agreed to four or more settlements since January 1, 2003.

In the Monitor's view, this is not the "publicly credible disclosure program" demanded by the Medical Board, the JLSRC, and its staff in 2002. Civil malpractice settlements are increasingly public information since the Judicial Council adopted rules prohibiting the sealing of court records in 2001[343] — and MBC (which publicly voted to disclose all malpractice settlements over $30,000) may appear overly protective and solicitous of the medical profession with its "three-in-ten" and "four-in-ten" limitations on the disclosure of public information that a consumer can obtain at the local county courthouse. Civil malpractice settlements are reached in the context of a public judicial proceeding financed with taxpayer money in which the physician has every opportunity to be represented by counsel and to reject the settlement[344] — and the proceeding pertains to the physician's professional performance (and not to his personal life); secreting this information is offensive both to taxpayers and to the judicial system. Insurers, hospitals and HMOs, and the Board itself demand, obtain, and rely upon a physician's complete malpractice history before determining whether to ensure, grant privileges to, or license that physician. Only consumers are left in the dark.

The medical profession consistently argues that if a physician with multiple settlements is truly a danger to the public, the Medical Board should take disciplinary action against that physician

[343] The routine sealing of court records is a thing of the past under recent rule changes adopted by the Judicial Council. Effective January 1, 2001, the Judicial Council adopted new rules 12.5 and 243.1–243.4, California Rules of Court, which expressly prohibit courts from sealing court records (including settlements) simply because the parties agree to their sealing, and permit courts to seal court records only if they make the following findings: (1) there exists an overriding interest that overcomes the right of public access to the record; (2) the overriding interest supports sealing the record; (3) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to achieve the overriding interest. These rules apply statewide to courts across California. However, some large California counties have prohibited routine sealing of otherwise-public court documents for many years. Effective July 1, 1990, the San Diego County Superior Court adopted local rule 6.9 (now numbered as rule 2.48), which prohibits the sealing of court records except to protect a legitimate trade secret or privileged information.

[344] *See* Bus. & Prof. Code § 801(f).

and publicize that — not the settlements. The response to that argument is twofold: (1) MBC cannot be reasonably expected to take prompt and decisive disciplinary action against all dangerous physicians under current resource constraints; and (2) the Medical Board does in fact take disciplinary action against most physicians with multiple settlements. Exhibit XIII-A below reveals the results of MBC staff's analysis of physicians with the most settlements as of June 24, 2003.

Exhibit XIII-A. MBC Disciplinary Action Against Physicians with Seven or More Malpractice Settlements as of June 24, 2003

Physician's Specialty	# of Settlements	Investigation/Discipline
Urology	80	Stipulation: license surrendered following the filing of Accusation.
Plastic Surgery	35	Stipulation: suspension, probation following the filing of Accusation; Petition to Revoke Probation filed.
Neurosurgery	27	Accusation filed; hearing scheduled.
Urology	15	Disciplined twice; suspension & probation: At present, physician has not met terms of probation and is not able to practice.
Plastic Surgery	14	ISO issued; Stipulation: license surrendered.
Neurosurgery	12	7 years probation; physician was denied Petition for Early Termination.
Ophthalmology	12	Stipulation; license surrendered.
Ophthalmology	10	Revoked; criminally convicted; discipline and felony conviction on appeal.
Orthopedic Surgery	9	Accusation filed and withdrawn.
Neurosurgery	8	Investigation of several cases resulted in "closed with merit," but there was insufficient evidence for findings of gross negligence.
Orthopedic Surgery	8	Accusation filed; three years probation granted and completed.
General Surgery	8	Investigation of cases resulted in citation and fine for giving false information, but there was insufficient evidence for finding of gross negligence.
Obstetrics/ Gynecology	8	Accusation filed and probation granted, which was followed by a Petition to Terminate Probation. As a result of petition, physician stipulated to surrender license.
Obstetrics/ Gynecology	8	Physician died while under investigation, and therefore no action was taken (although it was likely that an Accusation would have been filed).
Ophthalmology	8	Accusation filed, awaiting hearing. Physician is also convicted of a felony.
Plastic Surgery	7	Physician died after Accusation was filed, and therefore no disciplinary action was taken.
Plastic Surgery	7	Physician died while under investigation, and therefore no action was taken (although it was likely that an Accusation would have been filed).
Plastic Surgery	7	Stipulation: Surrender of License, after ISO and Accusation were filed.
Neurosurgery	7	Under investigation; several cases already "closed with merit" with insufficient evidence for findings of gross negligence.
Orthopedic Surgery	7	Investigation conducted and there was insufficient evidence for finding of gross negligence. Several cases were "closed with merit."
Orthopedic Surgery	7	AG's Office denied request for Accusation to be filed and requested more evidence. While under further investigation, physician died, and no action was taken.
General Surgery	7	Currently under investigation for some cases; other cases were "closed with merit" as investigation was unable to obtain sufficient evidence for finding of gross negligence.

Source: Medical Board of California

Of the 22 physicians listed (all of whom had agreed to seven or more settlements since their licensure as physicians), MBC investigated all 22 of them and attempted disciplinary action against at least 17 of them; five of these physicians died while their cases were in the accusation phase or under investigation. Of the 17 cases in which MBC attempted disciplinary action, it succeeded in ten, and two others are pending. Cases against the other five physicians were closed "with merit" or for insufficient evidence of gross negligence. Obviously, multiple settlements are a major predictor of future MBC disciplinary action. Why must consumers — and only consumers — be forced to wallow in ignorance while these physicians are injuring patients and racking up the requisite number of settlements prior to disclosure of those settlements and eventual MBC disciplinary action?

Those who oppose broader disclosure of medical malpractice settlements on the Internet argue that, in every profession, people make mistakes. Happily, in most jobs, a mistake does not mean that someone dies or is disabled. But, they say, in medicine, mistakes that will inevitably be made by even highly capable, highly trained, highly talented physicians could have devastating human consequences. Similarly, those doctors who choose to treat the most difficult cases logically may be sued more because the inevitable greater number of sad outcomes increases the risk of someone suing.

They argue that disclosure of these consequences — especially on the easy-to-access Internet — is so inflammatory that the public may be dissuaded from seeing physicians who are truly excellent healers. They point out — correctly — that, unlike some other states, California does not permit MBC to take disciplinary action against a physician for a single act of negligence, no matter how tragic the consequences. This, they correctly observe, is recognition in California law that simple errors are not ipso facto related to a physician's competence to treat patients. They are instead matters where the issue is compensation for the harm done, not punishment for, in essence, being human. Based on these arguments, opponents of the Board's proposed disclosure policy succeeded in persuading members of the Legislature that only those doctors at the far ends of the medical malpractice settlement spectrum ought to have their settlements disclosed on the Internet. Confronted with such arguments, the author amended the bill to ensure disclosure of at least some medical malpractice settlements and, in all likelihood, to show by practice that many of the forecast fears expressed by opponents would not occur, just as they had not in other states.

The Monitor believes that these arguments miss an important point. At the heart of the MICRA bargain is the assumption that the public will and should accept the Board's enforcement and disclosure program as a credible and trustworthy substitute for having ready access to quality lawyers willing to seek compensation that is artificially limited. As the 2002 JSLRC background paper points out, the credibility of the Board and its enforcement program cannot long endure if it keeps secret from the public information that every other stakeholder deems absolutely necessary

— namely, complete and unedited medical malpractice settlement information. If medical malpractice insurers and hospitals themselves demand this information before dealing with a physician, why should consumers be deprived of it?

3. MBC is not authorized to disclose misdemeanor criminal convictions that are substantially related to the qualifications, functions, and duties of a physician.

Since 1993, MBC has disclosed felony criminal convictions against physicians. However, it has never disclosed misdemeanor criminal convictions — including those convictions which were originally charged as felonies and/or "wobblers"[345] but were pled down to misdemeanors.

Conviction of a misdemeanor that is substantially related to the qualifications, functions, and duties of a physician is grounds for disciplinary action.[346] Under existing law, a conviction of more than one misdemeanor or any felony involving the use, consumption, or self-administration of any controlled substance, dangerous drug, or alcohol constitutes conclusive evidence of unprofessional conduct.[347] MBC is entitled to receive information about misdemeanor criminal convictions against physicians.[348] In 2002, the Joint Legislative Sunset Review Committee recommended that MBC disclose "all physician misdemeanor criminal convictions that have a substantial relationship to the practice of medicine . . . ."[349] The Medical Board itself agreed to disclose all substantially related misdemeanor convictions at its May 2002 meeting.[350]

A misdemeanor criminal conviction is just that — a *crime*. And it is not a mere allegation — it is a *conviction*. A misdemeanor criminal conviction is either an admission or a finding by a jury or court — beyond a reasonable doubt — of the commission of an act which has been categorized as a *crime* by the Legislature. A misdemeanor criminal conviction is public information. In an April 2000 report, even the Federation of State Medical Boards expressed support for the disclosure of substantially related misdemeanor criminal convictions — which the Federation

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[345] A "wobbler" is a crime that may be charged as either a felony or misdemeanor based on the facts of the case and in the discretion of the public prosecutor. *See* Penal Code § 17.

[346] Bus. & Prof. Code §§ 490 *et seq*., 2236.

[347] *Id*. at § 2239(a); *see also Griffiths v. Superior Court of Los Angeles County (Medical Board of California, Real Party in Interest)* (2002) 96 Cal. App. 4th 757.

[348] Bus. & Prof. Code § 2236(b)–(c).

[349] Joint Legislative Sunset Review Committee, *Final Recommendations of the Joint Legislative Sunset Review Committee on the Medical Board of California* (May 2002) at 3.

[350] *See supra* Ch. IV.G.

defined to include "misdemeanors involving offenses against the person, offenses of moral turpitude, offenses involving the use of drugs or alcohol, and violations of public health and safety codes."[351]

4. MBC is not disclosing all significant terms and conditions of probation on its Web site.

Section 2027(a)(1) requires MBC to post on the Internet ". . . whether or not the licensee is in good standing, subject to a temporary restraining order, subject to an interim suspension order, or subject to any of the enforcement actions set forth in section 803.1." Section 803.1 directs MBC to "disclose to an inquiring member of the public information regarding any enforcement actions taken against a licensee by [the] board or by another state or jurisdiction, including all of the following: . . . (3) revocations, suspensions, *probations, or limitations on practice ordered by the board, including those made part of a probationary order or stipulated agreement*" (emphasis added).

Taken together, these sections require MBC to post significant terms and conditions of probation on the Web. MBC's *Manual of Model Disciplinary Orders and Disciplinary Guidelines* sets forth 13 standard terms of probation and 23 optional terms of probation. Some of these optional terms and conditions of probation — including restrictions on practice or prescribing, a requirement to have a third-party chaperone present when examining or treating patients, and requirements to participate in the Board's Diversion Program and to abstain from the use of controlled substances and/or alcohol — are significant and would influence patient choice. These terms and conditions of probation are part of a public Board disciplinary order and must be disclosed to the public under sections 2027 and 803.1.

Due in part to limitations imposed by its CAS computer system, MBC does not consistently disclose all significant terms and conditions of probation on the Internet.[352] As described in Chapter V, CAS data are largely "imported" onto the Board's Web site, so limitations on CAS' data fields result in limitations on the amount and type of information that MBC can disclose to the public via its Web site. Having looked at literally hundreds of MBC Web site screens on California physicians, the Monitor can say that a few screens of physicians whose licenses are on probation disclose significant terms of probation. For example, one physician's screen states "six years probation with

[351] Federation of State Medical Boards, *Report of the Special Committee on Physician Profiling*, 87:2 JOURNAL OF MEDICAL LICENSURE AND DISCIPLINE (2001) at 53.

[352] When section 2027 was amended in 2002 to require MBC to disclose "limitations on practice" ordered by the Board, MBC staff searched the records of all physicians on probation for restrictions or limitations on practice, to enter those onto the Internet. It has not been completely successful in this effort. Additionally, section 803.1 requires the Board to disclose information on "probations" — and it does not consistently post all significant terms and conditions of probation.

various terms and conditions; restrictions: during probation, Dr. [X] is prohibited from providing anesthesia for laser ENT surgeries and supervising physician assistants." However, the screens of most physicians whose licenses are on probation simply state "seven years probation with various terms and conditions." That disclosure does not comply with the law.

MBC is moving toward resolution of this issue. First, its *Action Report* licensee newsletter is now including complete summaries of Board orders issued to disciplined physicians. More importantly, MBC is in the process of implementing a revamped Web site that will afford online access to public documents. Thus, when a physician is disciplined, his or her screen will eventually contain a link to the actual disciplinary order, including any terms and conditions of probation imposed.[353]

C. Initial Recommendations of the MBC Enforcement Monitor

Recommendation #48: Sections 2027 and 803.1 should be consolidated and harmonized to implement the purposes behind the creation of MBC's Web site in AB 103 (Figueroa): "allowing the public easy access to important information about physicians, particularly in the area of medical negligence . . . ." The fine-tuning of these two sections would also eliminate drafting errors and inconsistencies between the two statutes that have caused confusion and expensive litigation; save MBC time and money by ensuring that most public information is posted on the Board's Web site; and ensure that information disclosed to consumers by MBC is consistent and accurate regardless of the way in which the consumer asks for it.

Recommendation #49: All medical malpractice settlements exceeding $30,000 should be disclosed on MBC's Web site with the disclaimer currently required in section 803.1(c). Subsequent experience has now shown that the compromise reached in 2002 — which has resulted in the disclosure of the settlements of seven (7) physicians — is not a "publicly credible program of public disclosure" as demanded by the Board and the JLSRC in 2002. Medical malpractice settlements are public information reached in the context of a public judicial proceeding financed with taxpayer money in which the physician is represented by counsel and may reject the settlement. Every other stakeholder has a physician's complete malpractice history; only consumers are left in the dark. Consumers are entitled to that same information in making decisions affecting the lives and health of themselves and their families.

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[353] As noted above, Public Citizen's Health Research Group (HRG) rates the Web sites of state medical boards for both content and user-friendliness. In 2002, MBC's Web site earned a "B" in both areas — up considerably from its overall "D" grade in 2000. Public Citizen Health Research Group, *Survey of Doctor Disciplinary Information on State Web Sites* (Apr. 9, 2002) at 2–3. The addition of a link to actual Board orders and other public documents, along with a designation of each physician's specialty (which is now being collected by MBC) may result in a higher ranking for MBC's Web site.

Recommendation #50: All misdemeanor criminal convictions substantially related to the qualifications, functions, and duties of a physician should be disclosed on MBC's Web site. As recommended by the Federation of State Medical Boards, these "substantially related" criminal convictions should include "misdemeanors involving offenses against the person, offenses of moral turpitude, offenses involving the use of drugs or alcohol, and violations of public health and safety codes."

Recommendation #51: MBC should disclose all significant terms and conditions of public probation orders on its Web site. MBC should continue in its efforts to revise its Web site so that consumers can access public documents — including complete Board disciplinary decisions and stipulations that set forth all significant terms and conditions of probations.

Recommendation #52: Section 2027 should be amended to permit MBC to disclose the resignation or surrender of hospital privileges after the hospital has notified the physician of an impending investigation under section 805(c). The number of disclosable section 805 reports has dwindled significantly to six (6) in 2003–04, such that the intent behind section 2027(a)(6) — public disclosure of serious peer review actions — is being defeated.